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No. 86-496

# In the Supreme Court of the United States

**October Term, 1986**

VOLKSWAGEN OF AMERICA, INC.,
*Petitioner,*

v.

ANGELINE S. PROTOS,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## Brief In Opposition To Petition For Writ Of Certiorari

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 701(j) Of The Civil Rights Act Of 1964 Constitutes An Establishment Of Religion In Violation Of The First Amendment?

2. Whether There Was Sufficient Evidence For The District Court To Determine That, As A Matter Of Fact, Petitioner/Employer ("Volkswagen") Could Accommodate Respondent/Employee's ("Mrs. Protos") Sincerely Held Religious Beliefs Without Undue Hardship?

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Angeline S. Protos, submits this Brief In Opposition To The Petition For Writ of Certiorari filed by Petitioner Volkswagen of America, Inc., Appellant below, in the action captioned, Angeline S. Protos v. Volkswagen of America, Inc., No. 85-3591. The Opinion of the United States Court of Appeals for the Third Circuit is published at 797 F.2d 129 (3d Cir. 1986).

## COUNTERSTATEMENT OF THE CASE

Angeline S. Protos was hired by Volkswagen as an assembler at the New Stanton, Pennsylvania assembly plant on May 9, 1979. At all times relevant hereto, Mrs. Protos was a member of the Worldwide Church of God.

One of the tenets of the Worldwide Church of God is that its members shall not work on the Sabbath which extends from sunset on Friday to sunset on Saturday. Mrs. Protos' religious beliefs were sincerely held and she was an active and respected member of her congregation. The penalty for a member of the Worldwide Church of God who does not observe the Sabbath requirement is excommunication.

Prior to September of 1979, Mrs. Protos was able to work her scheduled shift without any difficulty since her workday ended on Friday prior to the Sabbath. At all times,

Mrs. Protos was universally considered an extremely competent, loyal and highly motivated employee.

In September, 1979, Volkswagen began scheduling mandatory overtime on Saturday which would require Mrs. Protos to work on Saturday in violation of her religious beliefs. Mrs. Protos immediately presented her supervisor with written documentation of her religious beliefs and informed her supervisor that she would not be able to work on Saturday.

On September 29, October 6 and October 13, 1979, Volkswagen scheduled mandatory overtime for its employees, including Mrs. Protos. Mrs. Protos did not work and was not disciplined by Volkswagen for not working these Saturdays pending a determination by management on her request to be excused from Saturday overtime.

Beginning with her absence on Saturday, November 3, 1979, Mrs. Protos was advised

that additional absences for religious reasons would not be permitted and that any future absence would result in discipline.

After November 3, 1979, Volkswagen repeatedly instructed Mrs. Protos that she must be present every Saturday, regardless of her religious beliefs. Volkswagen however, during this same period, provided vacation time and excused absences to its employees on Saturdays, none of whom requested Saturdays off for religious reasons.

Beginning on November 9, 1979, Volkswagen began to impose its progressive discipline on Mrs. Protos for her failure to work on Saturdays. That discipline progressed as follows:

November 9, 1979 - Verbal Warning

December 10, 1979 - Written Formal Warning

February 4, 1980 - One-Week Layoff

February 25, 1980 - Two-Week Layoff

On March 17, 1980, Mrs. Protos was discharged for failing to work on Saturday, March 15, 1980.

The only reason offered to Mrs. Protos for the imposition of discipline was that another employee requested Saturday off to go small game hunting. At no time was Mrs. Protos advised that her absence created any production problems, cost Volkswagen any money or caused any hardship whatsoever.

Mrs. Protos' job assignment while employed at Volkswagen was in Trim 15, a portion of the Trim Department which, in turn, was a portion of the assembly line. Mrs. Protos' specific responsibility was to connect four color-coded wires of varying lengths to four connectors and to attach a ground screw. Mrs. Protos' job could be learned in 15 minutes and was the least difficult and strenuous job in Trim 15.

Volkswagen had several mechanisms available to deal with employee absence

while Mrs. Protos was employed there. Those mechanisms included Absentee Relief Operators, Tag Relief Operators and Area Coordinators. These employees would be available to fill in for an absent employee at the same rate of pay without hardship or any cost to Volkswagen.

Volkswagen also had numerous mechanisms in place to rectify errors or mistakes during the actual production process. These mechanisms were able to insure continued production and quality control at all times, including the Saturdays when Mrs. Protos was absent.

Volkswagen did not indicate to Mrs. Protos, at any time while she was being disciplined, that her absences were costing Volkswagen any money whatsoever. In addition, Volkswagen was unable to identify, at any time, including trial, any specific amount of money that Mrs. Protos' absences were costing Volkswagen.

Following her termination in March, 1980, Mrs. Protos filed a charge with the Equal Employment Opportunity Commission ("E.E.O.C.") alleging that she had been fired in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.

On November 17, 1981, the E.E.O.C. issued a determination that there was reasonable cause to believe that Volkswagen had violated Title VII of the Civil Rights Act of 1964 and on February 22, 1984, the E.E.O.C. issued a Notice Of Right To Sue.

The present suit was filed by Mrs. Protos on May 21, 1984 and tried without a jury before the Honorable Donald E. Ziegler from July 16, 1985 to July 24, 1985. On August 27, 1985, Judge Ziegler filed Findings of Fact and Conclusions of Law directing that judgment be entered in favor of Mrs. Protos and against Volkswagen in the sum of $73,911.36. That decision is

published at Protos v. Volkswagen of America, Inc., 615 F.Supp. 1513 (W.D. Pa. 1985).

At trial, Volkswagen presented evidence hoping to prove that efficiency, morale, production and quality were compromised as a result of Mrs. Protos' absence. The District Court's Findings of Fact rejected Volkswagen's evidence and concluded, inter alia:

- ... defendant had available, at the same rate of pay, qualified employees who were able and did perform the assignment of plaintiff during her absence, without undue hardship or de minimus cost to defendant.

- ... defendant had available, and utilized Absentee Relief Operators and Tag Relief employees to replace plaintiff without affecting the efficiency, quality or production of Trim 15 and the assembly line.

- ... defendant was able to cover the absence of plaintiff on each of the relevant days without an undue hardship indeed without any hardship whatsoever.

- ... defendant was able to replace plaintiff on each Saturday without any hardship. Normal production continued and quality control was maintained, even when the assembly line operated at an accelerated pace.

- ... defendant was able and did replace plaintiff with competent substitutes, without difficulty throughout the manufacturing process.

- ... defendant was able to conduct an efficient and routine assembly line operation on the days on which plaintiff was absent due to her religious beliefs, despite the unexplained absences of other employees.

- ... defendant was able and did procure qualified substitute employees to perform the job of plaintiff without violation or deviation from the collective bargain agreement between defendant and the United Auto Workers of America.

(See Petition at B-1 to B-7.)

On appeal, the United States Court of Appeals for the Third Circuit found that the District Court applied the correct legal standard, that the District Court's Findings

of Fact were not clearly erroneous and that the reasonable accommodation requirements of Title VII do not violate the Establishment Clause of the First Amendment.

## SUMMARY OF ARGUMENT

The constitutionality of the reasonable accommodation provisions of Title VII has now been ruled on by Courts of Appeal on seven different occasions representing five different Circuits. In each of those cases, the Court has found the reasonable accommodation provisions to be constitutional by applying the tests which this Court has set out to decide challenges under the Establishment Clause. In addition, these decisions are consistent with the decisions of this Court under the Establishment Clause including the decision in the recent case of Estate of Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985).

The factual and legal questions presented by this case are unrelated to the questions presented in Ansonia Board of Education v. Philbrook, No. 85,-495, which was recently argued before this Court. For that reason, this Court should not delay disposition of this Petition until Philbrook is decided.

The factual arguments raised by Volkswagen rely on disputed evidence which was considered and rejected by the District Court and the Court of Appeals. Both lower Courts in this case have properly applied the principals set down by this Court in Trans World Airlines v. Hardison, 432 U.S. 63 (1977) and the facts as found by the Trial and Appellate Courts raise no important or novel issues.

REASONS FOR DENIAL OF WRIT

I. THE DECISION OF THE COURT OF APPEALS THAT THE REASONABLE ACCOMMODATION PROVISIONS OF TITLE VII ARE CONSTITUTIONAL IS CONSISTENT WITH THE DECISION BY EVERY COURT OF APPEALS THAT HAS REVIEWED THIS QUESTION AND WITH THE DECISIONS OF THIS COURT UNDER THE ESTABLISHMENT CLAUSE.

The question of whether the reasonable accommodation provisions of Title VII are violative of the Establishment Clause of the First Amendment is hardly a novel one. Including the present case, the various Courts of Appeal have ruled on the constitutionality of reasonable accommodation on seven occasions.[1/] In these decisions, covering five Circuits, the

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1/ Protos v. Volkswagen of America, Inc., 797 F.2d 129, 135 (3rd Cir. 1986) (see Petition at A-11); McDaniel v. Essex Intern., Inc., 696 F.2d 34, 37 (6th Cir. 1982); Anderson v. General Dynamics Convair Aerospace Div., 648 F.2d 1247, 1248 (9th Cir. 1981); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1244-1246 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1981); Nottelson v. Smith

Courts have universally held that the duty of employers to reasonably accommodate an employee's religious beliefs does not violate the Establishment Clause.

Moreover, this Court's decision in Estate of Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985), is not only consistent with these decisions, but Thornton reinforces the Establishment Clause holdings in the Title VII cases. The Connecticut statute struck down in Thornton imposed an absolute duty on employers and employees to conform their business practices to the particular religious practices of an employee:

> The State thus commands that Sabbath religious concerns auto-

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1/ continued.

Steel Workers, 643 F.2d 445, 453-455 (7th Cir. 1981), cert. denied, 454 U.S. 1046 (1981); Hardison v. T.W.A., Inc., 527 F.2d 33, 43-44 (8th Cir. 1975), rev. on other grounds 432 U.S. 63 (1977); Cummins v. Parker Seal Co., 516 F.2d 544, 551-554 (6th Cir. 1975), affd. per curiam by an equally divided Court, 429 U.S. 65 (1976).

> matically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. Thornton, 105 S.Ct. at 2918.

Indeed, the Court specifically notes that, "the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals." (Emphasis added.) Thornton, 105 S.Ct. at 2918. It is clear that the Court in Thornton held that it was the absolute nature of the statute that violated the Establishment Clause and also held, by implication, that a reasonable accommodation statute would produce a different result.

While this Court has never directly passed on the constitutionality of the reasonable accommodation provisions of Title VII, three members of this Court have previously written to confirm that it would pass constitutional muster. In Trans World

Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), Justices Marshall and Brennan wrote in dissent after the majority had, by its decision, not reached the constitutional issue:

> If the State does not establish religion over non-religion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer. Thus, I think it beyond dispute that the Act does -- and, consistently with the First Amendment, can -- require employers to grant privileges to religious observers as part of the accommodating process. 432 U.S. at 90-91.

Then, in Thornton, Justices O'Connor and Marshall wrote in concurring:

> I do not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act are similarly invalid.... Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the

> Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice. 105 S.Ct. at 2919.

Volkswagen's primary concern in its constitutional challenge is that reasonable accommodation conveys an "economic benefit" on Mrs. Protos. To the contrary, if Volkswagen had complied with the reasonable accommodation provisions of Title VII, Mrs. Protos would not have economically benefited but would have avoided a severe economic penalty by retaining her employment. And, even if retaining her employment is considered a "benefit", it is certainly the kind of incidental benefit that this Court has traditionally permitted where Establishment Clause challenges have been rejected. Everson v. Board of Education of Ewing Twp., 330 U.S. 1 (1947) (Parents of parochial school students would save transportation expenses.); Wisconsin v. Yoder,

406 U.S. 205 (1972) (Amish children not in school could contribute additional economic benefit to their families.); Sherbert v. Verner, 374 U.S. 398 (1963) (Seventh-Day Adventists permitted greater choice in determining day of week to be free of employment responsibilities); Gillette v. United States, 401 U.S. 424 (1971) (Conscientious objectors could avoid combat services.); Walz v. Tax Commission, 397 U.S. 664 (1970) (Tax exempt institutions avoid payment of property taxes).

Finally, any perceived benefit to Mrs. Protos [2/] is certainly outweighed where, as here, Congress attempts to:

> accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience". Gillette v. United States, supra, 401 U.S. at 453.

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2/ It should be noted that any benefit in this regard was minimal. Since Mrs. Protos was terminated, Volkswagen has scheduled Saturday over-time on only eight occasions in nearly six years, or

## II. THE UNDUE HARDSHIP QUESTION IN THIS CASE IS UNRELATED TO THE QUESTIONS PRESENTED IN ANSONIA BOARD OF EDUCATION V. PHILBROOK.

This Court, on October 14, 1986, heard argument in the case of Ansonia Board of Education v. Philbrook, No. 85-495. While that case has some elements in common with this case, its issues are fundamentally different and its disposition will be little, if any, assistance in deciding this case.

Philbrook, as this Court is aware, poses the question of whether an employer can be required to accept the employee's proposed accommodation where the employer has already presented its own reasonable accommodation. In that case, the employer had agreed to give the employee any time required for religious observance. The employer's

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2/ continued.

an average of slightly more than once a year.

proposed accommodation, however, only included three days of paid leave and provided that additional leave would be unpaid.

In the present case, Mrs. Protos would have, at all times, happily accepted unpaid leave. Volkswagen, however, made it clear that no leave was possible, paid or unpaid. Hence, Mrs. Protos never had the accommodation available to Philbrook and was faced with the Hobson's choice that Title VII was intended to prevent: Your Religion or Your Job.

Since the questions presented in Philbrook are so remote from the present case, delaying the decision in this case until Philbrook is decided would only further postpone justice for Mrs. Protos who filed her charge of discrimination nearly seven years ago.[3/] Even without further

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3/ That charge was filed November 23, 1979. (See J.A. 677).

delays, Mrs. Protos has certainly waited long enough to have her rights under Title VII determined. Justice delayed in this context provides little protection for victims of illegal discrimination and even less deterrent to those responsible for the serious injuries sustained by wrongly terminated employees.

## III. THE STANDARDS SET DOWN BY THIS COURT IN TRANS WORLD AIRLINES V. HARDISON WERE PROPERLY APPLIED IN THIS CASE AND PETITIONER'S ARGUMENT TO THE CONTRARY RELIES ON AN INACCURATE AND INCOMPLETE RECITATION OF THE FACTS AND RAISES NO IMPORTANT OR NOVEL ISSUES.

Volkswagen urges this Court to conclude that the District Court and the Court of Appeals erred in not holding that a request to not work on any Saturday is "unreasonable" per se and thus does not require accommodation. Volkswagen also urges that this Court reject the factual findings of

both lower Courts. These contentions will be discussed seriatim.

A.

In Jordan v. North Carolina Nat. Bank, 565 F.2d 72 (4th Cir. 1977), the Fourth Circuit held that an employee whose sincerely held religious beliefs required that she not work on Saturdays could not be reasonably accommodated and that such a request was beyond accommodation. This "per se unreasonable" rule has not been adopted by any other Court despite the fact that the most frequently requested accommodation is that the employee be permitted to observe the Sabbath by not working.

The Court of Appeals in this case rejected the Jordan analysis by holding:

> To interpret Title VII in this fashion would effectively remove from the statute's protection all employees who subscribe to religions with strict prohibitions against Sabbath labor. By its terms, however, §701(j) encompasses

> within its scope "all aspects of religious observance and practice, as well as belief," and the EEOC guideline after which it was modeled specifically referred to observation of the Sabbath as an example of a protected observance, see 29 C.F.R. §1605.1 (1968). Indeed, the Hardison court itself proceeded on the premise that a Sabbath observer was entitled to be accommodated by her employer, and that the only question was "the reach of that obligation" on the part of the employer. 432 U.S. at 66, 97 S.Ct. at 2268. Protos v. Volkswagen of America, Inc., supra, 797 F.2d at 134. (See Petition at A-9.)

Moreover, the District Court concluded, after reviewing Jordan, that the dissent in that case presented the better analysis. In that dissent, Judge Winter wrote:

> There is not any question but that plaintiff, pursuant to her religious beliefs, would absolutely decline to work on Saturday. Her request for a "guarantee" is both an expression of the firmness and sincerity of her beliefs and fair notice to the Bank or any other employer that she could not comply with any order or direction to work on Saturday, lest the Bank or that employer think otherwise.

> But this is the beginning of the case, not the solution. It is the premise which invokes the Act and the regulation, for lacking one who has religious beliefs of the unbending nature of those held by plaintiff, neither Congress nor the Commission would have occasion to say that an employer has the duty to accommodate an employee's religious beliefs unless such accommodation would visit "undue hardship on the conduct of the employer's business." Jordan v. North Carolina Nat. Bank, supra, (Winter, J., dissenting)

The wise rejection of Jordan by both the District Court and the Court of Appeals should not be disturbed.

B.

Volkswagen's final contentions are nothing more than its desire to re-litigate the very facts that it presented at trial and which were rejected by the District Court. This Court has specifically cautioned Appellate Courts against conducting this kind of plenary review of findings made by a Trial Court:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.
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> But when a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Anderson v. City of Bessemer, 105 S.Ct. 1504, 1511-1513. (1985).

The Court of Appeals specifically noted that the criteria for deference noted in Anderson were present here:

> Moreover, in this case, the Trial Court's conclusion depended heavily on its assessment of the witnesses' credibility, and deference to the trial court is most warranted where such credibility determinations are at issue. Protos, supra, 797 at F.2d at 135, n. 3. (See Petition at A-11.)

Specifically, Volkswagen complains that the Court did not give sufficient weight to evidence:

> that there were numerous employees who wanted to take Saturdays off for secular reasons (such as hunting) and who complained when they were required to work while Mrs. Protos was excused. (See Petition at page 17.)

To the contrary, that evidence was unequivocally rejected by the Trial Court who held that complaints by one employee did not affect the routine operation of the assembly line or cause a hardship, de minimus or otherwise, to defendants. (Finding of Fact 24, see Petition at B-5 to B-6.)

Volkswagen also contends that the Court failed to consider the problems confronting Volkswagen due to increased absenteeism by other employees. This is also simply not the case. In the relevant finding of fact the Court found:

> ... defendant was able to conduct an efficient and routine assembly

> line operation on the days on which plaintiff was absent due to her religious beliefs, <u>despite the unexplained absences of other employees</u>. (Emphasis Added.)(Finding of Fact 26, see Petition at B-6).

Moreover, in urging that it has shown an undue hardship by simply showing that there were others also absent with Mrs. Protos, Volkswagen clearly misstates the reasonable accommodation requirements of Title VII. Volkswagen can refuse to accommodate Mrs. Protos where to do so would constitute an undue hardship, but attendance statistics alone can never show an undue hardship. For example, if an employer has ten employees and one does not work for religious reasons, there may be no undue hardship if the nine who do work perform all needed tasks. Only if the remaining employees are unable to perform the necessary work might an undue hardship be shown.

Volkswagen has not been able to show that Mrs. Protos' absence, even with the absences of other employees, had any effect on the production, efficiency or quality of the assembly line. The Trial Court so found and its findings were based on the overwhelming weight of the testimony and documentary evidence. The Court of Appeals, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, refused to disturb those findings and this Court should reach the identical conclusion.

## CONCLUSION

For the reasons stated above, Respondent requests that Certiorari be denied.

Respectfully submitted,

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